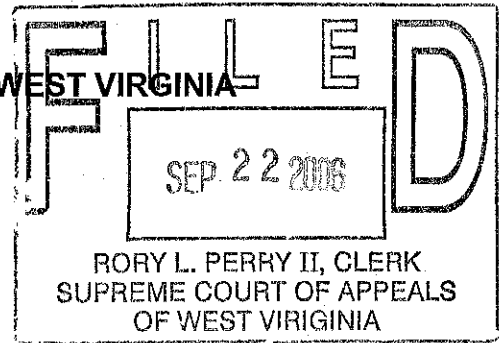


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

DOCKET NO. 33134



STATE OF WEST VIRGINIA,

Appellee,

v.

(Underlying Case: Mingo County Case No. 06-JN-47,48)

BRADLEY R.,

Appellant.

IN THE INTEREST OF THE MINOR CHILDREN:

AUSTIN G.
BREONA R.

DOB: 02-28-03
DOB: 04-25-05

BRIEF OF APPELLEE
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

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September 22, 2006

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STATEMENT OF THE CASE

By Order of the Circuit Court of Mingo West Virginia, the parental rights of Bradley R. (hereinafter "Appellant") to Breona G. were terminated by Order dated January 26, 2006. Physical and legal custody of the infant child was placed with the West Virginia Department of Health and Human Resources (hereinafter "Appellee") for permanent placement. This appeal by the Appellant is predicated on that Order.

FACTS

On September 1, 2005, the Appellee filed an emergency Petition in Mingo County, West Virginia, which alleged that Austin G. and Breona G. were in imminent danger, as outlined by West Virginia Code § 49-6-3(a). (2004 Supp. Vol.) (Petition for Immediate Custody of Infant Children in Imminent Danger, hereinafter "Petition").

In its Petition, the Appellee alleged that Alisha G. and the Appellant failed to cooperate with Child Protective Services (hereinafter "CPS") despite numerous visits to the home. The Appellee workers rarely saw the children, and it appeared as if the family was making efforts to avoid CPS. (Petition, pp 3-8). Alisha G. and the Appellant, when the Appellee was able to get in touch with them, claimed that Breona R. was visiting friends from Virginia, but they refused to provide a name, address, or phone number of these individuals. *Id* at 6. There was no electricity in the home, and the Alicia G. and the Appellant were not meeting the infant children's basic needs. *Id* at 7. In addition, The Appellee alleged drug abuse by Alisha G. insofar as she tested positive for opiates and barbiturates at the time of Breona R.'s birth. While Breona R. did not test positive for drugs, she did have some symptoms of withdrawal. *Id* at 3. Alisha G. reported to CPS workers that she had taken Valium, Lortab, and Xanax prior to the birth of Breona R. *Id*. Alisha G. signed a protection plan with CPS on April 27, 2005. *Id*. The Appellee alleged that the children were being kept by their paternal grandmother, Margaret V., who is a registered sex offender in the State of West Virginia. *Id* at 7. Finally, the Appellee believed that Alish G. and the Appellant were neglecting the medical care of Breona R., in that they were not keeping their doctors appointments and were not getting prescriptions filled. *Id*. at 5. This was especially of concern given her withdrawal symptoms at birth.

In June 2005, Mingo County DHHR determined that the Appellant had a child in Wyoming County, West Virginia, and that the Appellee there had substantiated abuse and neglect against him for substance abuse. *Id* at 2. That child is currently in foster care.

The Appellant was no longer cooperating with Wyoming County CPS or their services. *Id.* at 3.

At the September 6, 2005 preliminary hearing, the lower Court granted the Appellant a pre-adjudicatory improvement period for ninety (90) days. (p. 8.) In addition, the Court outlined specific things that the Appellant was required to do including random drug and alcohol screens, parenting, undergoing psychological test, and substance abuse counseling. *Id.* at 6-7. On September 27, 2005, the parental rights of Larry W. to Austin G. were voluntarily terminated. (p. 2.) On January 25, 2006, the lower court terminated the parental rights of the Appellant and denied his motion for post-termination visitation.

ARGUMENT

A. The Circuit Court Was Correct in Terminating the Parental Rights of the Appellant.

According to this Court, in *In re R.J.M.*, termination of parental rights may be employed without the use of intervening less restrictive alternatives when there is no likelihood that the conditions of neglect or abuse can be substantially corrected, as outlined by West Virginia Code § 49-6-5(b). 164 W. Va. 496, 266 S.E.2d 114 (1980), Syl. pt. 2.

West Virginia Code § 49-6-5(b) states that:

“...[N]o reasonable likelihood that conditions of neglect or abuse can be substantially corrected’ shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect, on their own or with help. Such conditions shall be considered to exist in the following circumstances, which shall not be exclusive:

(1) The abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such person or persons have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning;

(2) The abusing parent or parents have wilfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control;

(3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitation efforts of social, medical, mental health or other rehabilitation agencies designed to reduce or prevent the abuse and neglect of the child, as evidenced by the continuation or unsubstantial diminution of conditions which threaten the health, welfare or life of the child;. . . ."

(2004 Repl. Vol.) (*Emphasis added*).

In its September 6, 2005 Order, the Circuit Court ordered psychological testing for both Alicia G. and the Appellant, random drug and alcohol screening, parenting classes, and substance abuse counseling. In addition, the Court ordered supervised visitation with the children one time per week (pp. 6-7). According to the Monthly Court Summary filed by the the Appellee on January 6, 2006, Family Options, a service provider, had attempted to contact Alicia G. and the Appellant for parenting classes and in-home drug screens. They had been unsuccessful. (p. 2.) Furthermore, the Appellant had not kept his appointment for psychological treatments as previously ordered. *Id.* Finally, the Appellant did not visit with the infant children a single time during the months of November and December 2005. (See Exhibit A.)

The Appellant did not appear at either the December 5, 2005 Adjudicatory Hearing nor the January 26, 2006, Final Dispositional Hearing (See respective Orders, p. 1.) At

the time of the January 26, 2006 hearing, the Appellant was incarcerated at the South West Regional Jail. He was aware of the hearing but made no request to be transported, nor to appear via video conference. (Final Disp. Hrg., p. 11.)

The Supreme Court of West Virginia has held that "as a general rule, the least restrictive alternative regarding parental rights to custody of a child . . . will be employed. However, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights when it appears that the welfare of the child will be seriously threatened." *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980), Syl. pt. 1.

Furthermore, the Court has repeatedly stated that when dealing with children, the best interests of the child is the polar star that decisions should be made. *In re Erica C.*, 214 W. Va. 375, 589 S.E.2d 517 (2003).

The Appellee made every effort to allow the Appellant to be a good parent, and he failed to partake in any of the services that were offered. He even failed to show up to court to protect his interests, knowing that his rights to his children were in jeopardy. When comparing the lack of action on the part of the Appellant with the directives of case law and the West Virginia State Code, clearly the Circuit Court was correct in terminating the parental rights of the Appellant.

B. The Circuit Court Was Not Required to Grant Post-Termination Visitation to the Appellant.

This Court has previously stated that:

"When parental rights are terminated due to abuse and neglect, the circuit court may nevertheless in appropriate cases consider whether

continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest."

In re Christina L., 194 W. Va. 446, 460 S.E.2d 692, Syl. pt. 5.

When no bond exists, the consideration of post-termination visitation is not required.

In re Katie S., 198 W. Va. 79, 91, 479 S.E.2d 589, 601 (1996).

After receiving initial referral in this case, the Appellee made repeated efforts to visit with the infant children and to make sure that they were being properly cared for. These repeated visits to Alicia G. and the Appellant's home found that Breona R. was not in the home for weeks at a time, but rather was "staying with friends in Virginia". Breona R. is only one year old, and has been in the custody of the Appellee since she was five months old. She has been in her current foster home longer than she was in her father's home. Furthermore, Austin G. spent a great deal of time with his grandparents, one of whom is a registered sex offender, and not with the Appellant. The Appellant had no visits with the children in November or December, despite having the opportunity to see them. In addition, he missed the last two scheduled hearings in this matter.

The Appellant, in his brief, points to the fact that he was incarcerated during the January 26, 2006 hearing. He states that "... at the time of the Dispositional Hearing, Bradley R. was incarcerated and unable to attend the hearing". *Id.* What the Appellant failed to mention is that he made no effort to be at that hearing. He did not ask to be transported nor to be present via video-conference. A parent who so desperately wanted

'his' children to be placed in his custody should have made an effort to be at the hearing that would determine this very thing.

Additionally, the Appellant states that "Bradley R. should have been considered for placement due to the familia relationship and because the siblings could have been placed together" (Appellant's Brief, p. 5). The Appellant is not the biological father of Austin G. Furthermore, as the lower court pointed out, one of the more serious issues in this case was that Alicia G. and the Appellant were allowing Austin G. to stay with a registered sex offender. As indicated previously, on numerous occasions when the Appellee was able to find the Appellant, they were informed that Breona R. was in Virginia staying with friends. The Appellee is unsure how a "familia relationship" existed between the Appellant and Austin G., when they weren't related and spent little time together.

Austin G. and Breona R. are currently together in a pre-adoptive home where they have resided since March 2006. They are doing well in their placement. The Appellant did not bother to take the drug tests the Court ordered, did not have a psychological completed, did not attend parenting classes, and did not utilize his visits. That shows a total lack of caring on his part. If he truly wanted these children to be placed with him, he could have at least participated. A parent who makes no effort to rectify his current situation, knowing his parental rights are in jeopardy, should not be entitled to visitation. The Appellant seems to hold great stock in the fact that, in his opinion, it was only because he did not attend the dispositional hearing that Appellee opposed post-termination visitation. This is untrue. The Appellant has another CPS case in Wyoming County due to his drug use. The Mingo County DHHR alleged in their Petition that the Appellant is unable to meet the needs of his children because he does drugs. The Appellant failed to

have any meaningful participation in his improvement period. When coupled with his failure to attend scheduled court hearings, the Appellee does not believe that it is in the best interest of these children to have post-termination visitation and continued visitation with the Appellant.

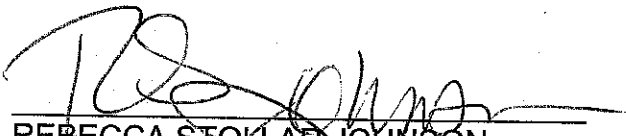
The infant children in this case are very young, i.e., three (3) and one (1). They have the opportunity to be adopted by a family who will love, care and support them, and they should not be held back by a parent who has yet to do any of those things. As this Court stated in *State ex rel. Amy M. v. Kaufman*, post-termination visitation should be allowed if it is in the child's best interest, and so long as it does not unreasonably interfere with the child's permanent placement. 196 W. Va. 251, 260, 470 S.E.2d 205, 214 (1996). In cases involving the granting of termination of visitation, this Court has generally indicated that the parent seeking visitation had an emotional bond with the children, the parent participated in visits, and these visits went well. See generally, *In re Charity H.*, 215 W. Va. 208, 599 S.E.2d 63 (2004); *In re Katie S.*, *supra*, p. 6. The case at hand can be differentiated from the above referenced cases in that no bond exists between the Appellant and these children. The lower court reviewed the record and considered and addressed the issue of post-termination visitation in its January 26, 2006, Order and did not find it to be appropriate in this case. (p. 21.) The Circuit Court is not required to grant post-termination visitation to the Appellant

CONCLUSION

WHEREFORE, based on the foregoing, the Appellee respectfully requests that this Court affirm the lower court's ruling in terminating the parental rights of the Appellant, in denying his right to post-termination visitation.

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES
By Counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, Rebecca Stollar Johnson, Assistant Attorney General, and counsel for the West Virginia Department of Health and Human Resources, do hereby certify that on this 22nd day of September 2006, I served a copy of the foregoing "BRIEF OF APPELLEE THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES" by United States Mail, postage prepaid, addressed as follows:

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REBECCA STOLLAR JOHNSON

09/19/2006 TUE 9:17 FAX 304 752 8977 KVC LOGAN

005/051

**KVC
Monthly Progress Report**

DS 35

KVC Office Address: PO Box 64, VerdunvilleKVC Staff: Tamara NicholsMonth/Year: December 2005KVC Program: Foster CareClient Name#: Breona RiffeDate of Birth: 4-25-05Medicaid Number: 03901391450Date of Intake: 9-1-05Referring County: MingoDHHR Worker: Joshua Murphy

Juvenile Probation Officer:

Parent/Foster Parents: Julie AndersonReferral Information: Foster CareSummary of services provided:Number of sessions attempted 4Number of supervised visits: 0Number of sessions completed 4Treatment AreaGoal #: Neglect

Objective # _____ Name service provided & number of sessions completed:

Objective # _____ Name service provided & number of sessions completed:

Goal #:

Objective # _____ Name service provided & number of sessions completed:

Objective # _____ Name service provided & number of sessions completed:

Define outcome: Progress/Retreat/Consistent Breona remains in placement and continues to thrive there. She continues to develop and grow without any problems. Breona continues to visit with her mother and maternal grandparents. Her mother recently has made comments about kidnapping the children if they are to be adopted. Our this has resulted in security measures being made to the visitation arrangements. The foster mother continues to take all steps to insure the child's safety. However the foster mother continues to get phone calls from CT's mother and grandmother regarding the placement of Breona and visitation arrangements.

EXHIBIT

tabbies

A

09/19/2006 TUE 9:17 FAX 304 752 8977 KVC LOGAN

0006/051

Domain evaluation with recommendations: CT's visits are as follows:

On 11-3-05-Grandparents came. On 11-16-05 - Grandparents came. On 11-23-05- Grandparents and mother came for visit. On 12-1-05- Grandparents and mother came. On 12-12-05 the visit was canceled due to the children having doctor appointments. On 12-22-05 - Grandparents came. On 12-29-05-Grandparents and mother came.

Family Breona continues to thrive in her current placement.

Mental Health Breona receives case management through KVC.

Medical Breona's medical needs are addressed by her foster family.

Legal Breona has no legal problems.

Education Breona is not in school.

Social Breona's social interactions are met by family and foster family activities.

Crisis

Pamela Nichols 11/5/05

Staff Signature

Date

[Signature]

Supervisor Signature

01/05/06

Date